SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF CASE	3
REASONS FOR GRANTING WRIT .	5
APPENDIX "A" Refusal of Rehearing by U. S. Fifth Circuit Court of Appeals	15
APPENDIX "B" Judgment of the U.S. Fifth Circuit Court of Appeals	16
APPENDIX "C" Judgment of the United States District Court, Eastern District of Louisiana, Division "B" . . .	18

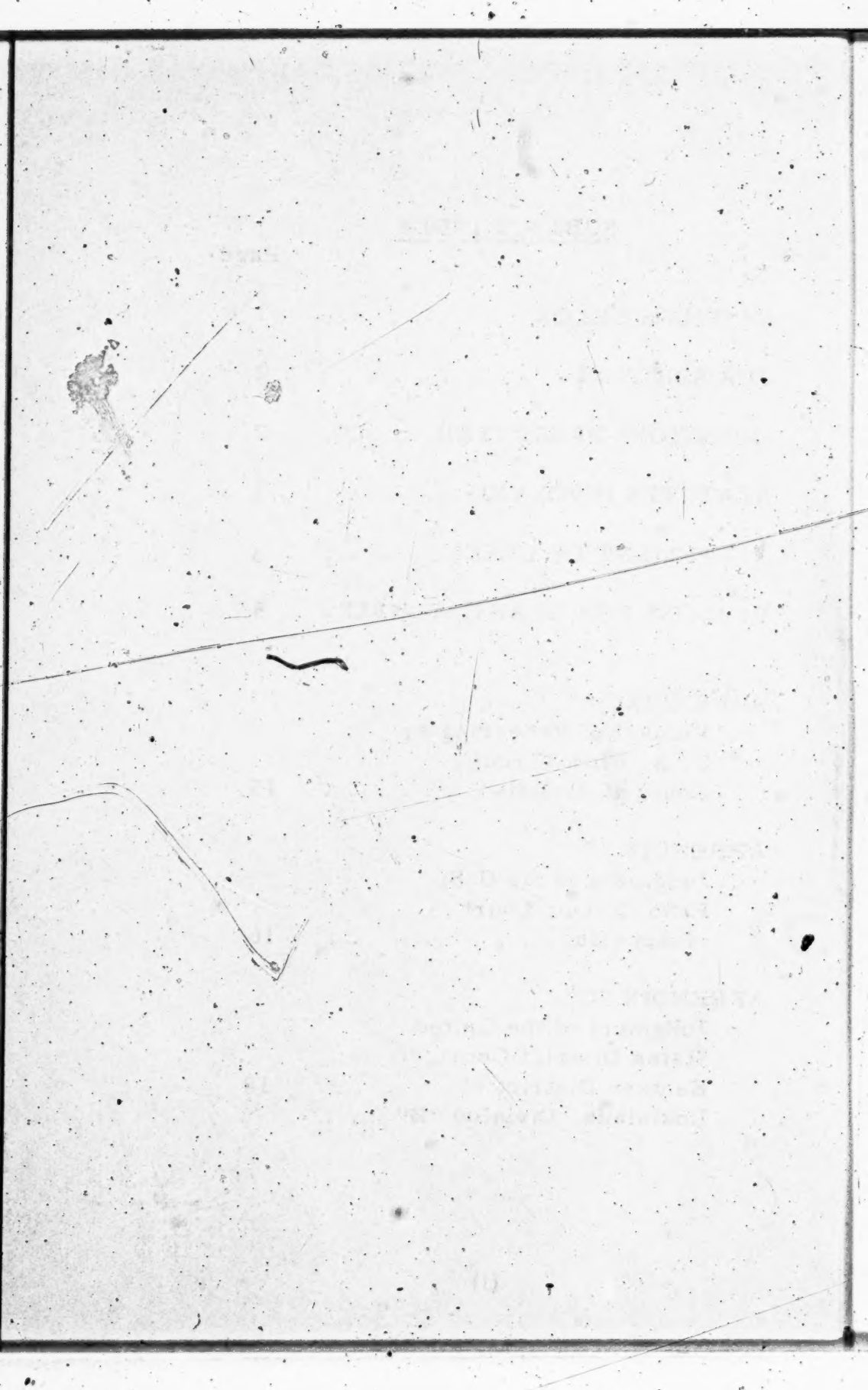

TABLE OF AUTHORITIES

	Page
Aho v. Jacobsen, 249 F 2d 309 (CA 1st 1957), reversed 359 US 25, 79 S Ct 602 (1959)	11
Albanese v. N. V. Nederlandsch Americansh Stoomvaart Maatschappi, (1965) 382 US 283, 86 S Ct 429	8
Boudoin v. Lykes Bros. Steamship Co., Inc., (1955) 348 US 336, 75 S Ct 382	11
Grumady v. Joachim Hendrick Fisser, ... (1959) 358 US 423, 79 S Ct 455	10
Gutierrez v. Waterman Steamship Corp., (1963) 373 US 206, 83 S Ct 1185	8
Mahnich v. Southern SS Co., (1944) 321 US 96, 64 S Ct 455	8, 10

TABLE OF AUTHORITIES (Cont.)

	Page
McQuiston v. Freighters & Tankers Steamship Co., 5 Cir. (1964) 327 F 2d 746	5
Mitchell v. Trawler Racer, Inc., (1960) 362 US 539, 80 S Ct 926	12
Neal v. Lykes Bros. Steamship Co., Inc., 5 Cir. (1962) 306 F 2d 313 . . .	5
Palermo v. Luckenbach Steamship Co., Inc. (1957) 355 US 20, 78 S Ct. 1 . .	12
Reed v. Yaka (1963) 373 US 410, 83 S Ct 1349	7
Seas Shipping Co. v. Sieracki, (1946) 328 US 85, 66 S Ct 872 .	8
Waterman Steamship Corporation v. Dugan & McNamara, Inc., (1960) 364 US 421, 81 S Ct 200 .	10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NUMBER

WILL FOSTER

VS.

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Will Foster, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered November 4, 1966, rehearing denied on December 6, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern

District of Louisiana, Division B, printed in Appendix C hereto, was unreported. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix B hereto, is reported at _____ F 2d _____. The order of the United States Court of Appeals, Fifth Circuit, denying the application for rehearing, printed in Appendix A hereto, was not reported.

JURISDICTION

The order of the United States Court of Appeals, Fifth Circuit, denying the Petition for Rehearing was denied on December 6, 1966, printed in Appendix A hereto. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) Whether or not a Reed v. Yaka shipowner, hiring longshoremen direct, has breached the warranty of seaworthiness when it assigned its employee to work ten feet above the regular deck/work level, without means of ingress or egress and without safety nets, at the same time cargo moved overhead?

(2) Whether or not an inverse loading procedure (I. E. first to the hatch/square, then to the wings) will create an unsafe place, so as to render a vessel unseaworthy?

(3) Is the adherence to a safety statute exempt from the warranty of seaworthiness when that shipowner is of the Reed v. Yaka type, hiring its longshoremen direct?

STATUTES INVOLVED

(1) General Maritime Law.

(2) Safety & Health Regulations for Longshoring

(a) Section: 9:32
(b) Section: 9:34
(c) Section: 9:43

STATEMENT OF CASE

On February 23, 1962, the petitioner was employed direct by Lykes Bros. Steamship Co., Inc., as a longshoreman, assigned to work aboard the SS ZOELLA LYKES, a vessel owned and operated by his employer. (R-48) The petitioner was assigned to work on top of a large box of household goods, 10 to 12 feet high and 5 by 5 foot wide (Dep.-6, 7, 9, 10, 11, 13 and 17) which was in the square or partially in the square of the hatch. (Dep.-11, 12) While standing on top of this large box of household goods, attempting to stow smaller boxes on top of the said large box (Dep.-11, 12, 13) a box of cargo fell from an overhead sling being transferred into the hold. (R-48, Dep.-14)

Standing on top the box of household cargo and seeing an overhead box falling towards him, the petitioner jumped to avoid a crushing blow of the falling box, thus injuring himself. (Dep.-15) On October 31, 1963, the petitioner filed a libel in rem and in personam against his employer claiming benefits pursuant to General Maritime Law and the Jones Act (46 USC 688).(R-48) In May of 1965 the shipowner filed a motion for a summary judgment, alleging there was no genuine issue of any material fact. (R-35) On September 1, 1965, the United States District Court for the Eastern District of Louisiana granted a summary judgment. (Appendix C) On September 30, 1965, present counsel, substituting for the prior counsel (R-19) filed an appeal in behalf of the petitioner with the United States Court of Appeals, Fifth Circuit. (R-20) On November 4, 1966, the appellate court affirmed the decision of the lower Court. (Appendix B) And a petition for a rehearing with the same United States Court of Appeals, Fifth Circuit, was filed on November 23, 1966.(R-2) And that petition was denied on December 6, 1966. (Appendix A)

REASONS FOR GRANTING WRIT

(1) The United States Court of Appeals for the Fifth Circuit has made reference to the case of McQuiston v. Freighters & Tankers Steamship Co., 5 Cir (1964), 327 F 2d 746 and Neal v. Lykes Bros. Steamship Co., Inc., 5 Cir (1962), 306 F 2d 313, as applicable herein. However, the petitioner submits that the mechanics of his accident in no way remotely resembles the lifting and twisting of his back by McQuiston or the conditions as complained by Neal.

The petitioner submits that the foregoing cases, given the widest credence, do not apply herein and do not in the least supply answers to the following problems posed herein:

(a) Will an inverse loading procedure (I. E. first to the hatch/square, then to the wings) create an unseaworthy condition?

(b) Is adherence to a safety statute exempt from the warranty of seaworthiness when that shipowner is of the Reed v. Yaka type, hiring its longshoremen direct?

(c) Has a Reed v. Yaka shipowner breached its obligation to its direct longshoreman when that longshoreman is assigned to work 10 feet atop a box of household cargo, without means of ingress or egress or safety nets, at the same time cargo is being moved overhead?

(2) Examining the accident to Will Foster it is obvious that the absence of safety nets, the absence of ingress and egress played some part in the mechanical proximate cause of his accident. Had ingress and egress been adequately provided he would not have had to make a choice between being crushed or jumping; and had safety nets been provided small cargo boxes would not have fell in his direction. And in this respect, the absence of safety nets and the absence of ingress and egress for this work area represented a violation of the following sections of the Safety & Health Regulations for Longshoring, Public Law 85-742 Stat 835 (Amending 44 Stat 1444, 33 USC 941), and R.S. 161, 5 USC 22:

"Section: 9:32

STOWED CARGO AND TEMPORARY LANDING PLATFORMS

(a) Temporary tables on which loads are to be landed shall

be of sufficient size and strength to permit the employees thereon to work in safety. (Emphasis ours)

(b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of persons, falling, the edge shall be guarded by line, safety net or railing. (Emphasis ours)

(c) When two gangs are working in the same hatch on different levels, a safety net shall be rigged and securely fastened so as to prevent men or cargo from falling. Emphasis ours.

Section 9:34

SKELETON DECKS

(a) No cargo shall be worked on a skeleton deck, mechano deck or other superstructure unless temporary flooring is provided, when necessary, to make a safe working surface."

Counsel for the shipowner has heretofore argued that violation of a safety statute, if so, for a shipowner such as Lykes Bros. Steamship Co., Inc., which hires a longshoreman direct (See Reed v. Yaka, (1963)

373 US 410, 83 S Ct 1349) does not represent a breach of the warranty of seaworthiness, because said violation of a safety statute, if so, represents "operational negligence" and not unseaworthiness, and is thus exempt from the warranty of seaworthiness. And if the foregoing was considered the courts below have adopted that holding.

But the petitioner avers such is contrary to the spirit, if not the holdings, of such cases as Albanese v. N. V. Nederlandsch Americansh Stoomvaart Maatschappi (1965) 382 US 283, 86 S Ct 429; and Gutierrez v. Waterman Steamship Corp., (1963) 373 US 206, 83 S Ct 1185.

Petitioner avers that when Lykes Bros. Steamship Co., Inc. violates a safety statute that it violates first as a shipowner, in line with its primary corporate purpose, and second as a stevedore, as its ancillary purpose. But in either event, it renders the vessel unseaworthy. To hold otherwise is to vitiate the holdings of Mahnich v. Southern SS Co. (1944) 321 US 96, 64 S Ct 455 and Seas Shipping Co. v. Sieracki (1946) 328 US 85, 66 S Ct 872), so that the shipowner will have found adequate way to delegate its obligation of seaworthiness to a non entity, out into oblivion.

3. A careful reading, allowing for lack of education of the petitioner, of the

depositions given by the petitioner herein, will reveal there was an inverse loading process being followed by Lykes Bros. Steamship Co., Inc., at the time of the petitioner's casualty. Cargo was being loaded in the hatch square prior to the completion of loading in the wings of the offending vessel. The same heretofore undenied by the shipowner, is revealed in the following passages of the deposition:

Page	6	Line	10/14
Page	10	Line	17/18
Page	11	Line	5/15
Page	12	Line	12/25
Page	13	Line	7/18

These passages indicate that because of the inverse loading process the petitioner was standing in a work area, where cargo had first been loaded, when the wings had yet to be loaded. This created a trap, hazard and unsafe place in which the petitioner was assigned to work, restricting and limiting him to choose between being crushed to death or suffer the consequences of jumping 10 feet below.

But in arguments on this point the shipowner has heretofore stated that such a condition, if it did exist, was merely a negligent operation. And thus far the shipowner's argument has prevailed with a summary judgment, affirmed by the appellate court in favor of the shipowner. But the

petitioner reurges that an inverse loading procedure is more than mere negligence. It is unseaworthiness in line with such cases as Mahnich v. Southern SS Co., (1944) 321 US 96, 64 S Ct 455; Waterman Steamship Corporation v. Dugan & McNamara, Inc., (1960) 364 US 421, 81 S Ct 200; Grumady v. Joachim Hendrick Fisser, (1959) 358 US 423, 79 S Ct 455.

4. Concerned about the revelation that Will Foster was assigned to work 10 feet above the regular work/deck level, without ingress/egress, exposed to falling cargo, the counsel for the shipowner repeatedly asked questions in the deposition of the petitioner about the size, weight and width of this household box of cargo, as evidenced by the following pages in the said deposition:

Page	6	Lines	10/14
Page	7	Lines	9/16
Page	8	Lines	4/5
Page	9	Lines	I/8
Page	9	Lines	22/25
Page	10	Lines	21/23
Page	11	Lines	21/25
Page	13	Lines	22/25
Page	17	Lines	2/4
Page	22	Lines	2/5
Page	23	Lines	22/25

Once, the deposition was had the counsel for the shipowner, thereafter, was careful never to refer to this condition, even

to the point of never making mention of the same in the appellate court where the instant counsel of the petitioner lodged appeal specifically on this point.

In granting a summary judgment in favor of the shipowner the courts below, like the shipowner's counsel, never made reference to this place of work where the petitioner was high, atop cargo, without ingress or egress, trapped, unable to avoid falling cargo. And since neither the district court or the appellate court made not even the slightest mention or reference to this entrapment the counsel for the petitioner must necessarily speculate that the holding of these lower courts is to the effect that the warrant of seaworthiness excludes from its obligation a work area that is free of entrapment.

But the petitioner avers his entrapment and the shipowner's violation of the Safety Regulations represent an unseaworthy condition and the hazard to which the petitioner was assigned to work was more critical than the dangerous instrument facing Boudoin in Boudoin v. Lykes Bros. Steamship Co., Inc., (1955) 348 US 336, 75 S Ct 382; Boudoin could fight back; Will Foster had a choice to be crushed or jump, and he jumped, thus injuring himself. And the instant petitioner did not have time to contemplate as did the seaman in Aho v. Jacobsen, 249 F 2d 309 (CA 1st 1957),

reversed 359 US 25, 79 S Ct 602 (1959). And unlike the seaman in Mitchell v. Trawler Racer, Inc. (1960) 362 US 539, 80 S Ct 926, who witnessed and knew the properties of spawn deposited on the ship railship rail the instant petitioner could not readily foresee that in the event a box of cargo fell his way he would need immediate access to a place of egress. And to come to a case pointedly decided on the question of ingress and egress the petitioner, Will Foster, was faced with a greater hazard and with far less means of escape than was afforded the seaman in Palermo v. Luckenbach Steamship Co., Inc. (1957) 355 US 20, 78 S Ct 1. Palermo had a choice of two routes, one of which was hazardous. Will Foster had a choice of either being crushed, or jump. He jumped, choosing injury over death.

On the bases of the foregoing cases, the petitioner urges it is merely simple inference to reach the conclusion that the plight of Will Foster was the result of an unseaworthy condition, and that a summary judgment dismissing the petitioner's cause does not properly lie herein.

CONCLUSION

For the foregoing reasons this petition for a writ of Certiorari should be granted.

Respectfully submitted,

CHARLES R. MALONEY
Attorney for the Petitioner,
Will Foster
816 Richards Building
New Orleans, Louisiana 70112
Telephone: 522-9039

PROOF OF SERVICE

I, Charles R. Maloney, attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served copies of the foregoing Petition for Writ of Certiorari on Mr. James L. Schupp, Jr., counsel for respondent by mailing a copy thereof, postage prepaid, addressed to his office at 2141 International Trade Mart Building, 2 Canal Street, New Orleans, Louisiana 70130.

Dated this _____ day of _____, 1967.

_____

CHARLES R. MALONEY

United States Court of Appeals
Fifth Circuit
Office of the Clerk

December 6, 1966

Edward W. Wadsworth
Clerk

Rm. 408-400 Royal
St., N. O., La. 70130

Re: No. 23120 - Will Foster vs Lykes Bros. Steamship Company, Inc., et al

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

/s/ Edward W. Wadsworth

Edward W. Wadsworth,
Clerk

APPENDIX (A)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23120

WILL FOSTER,

Appellant,

versus

LYKES BROS. STEAMSHIP COMPANY, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(November 4, 1966)

Before THORNBERRY and COLEMAN, Circuit Judges, and YOUNG, District Judge.

PER CURIAM: This is a suit in admiralty by a longshoreman for injuries sustained aboard a vessel of the defendants while it was being loaded at a wharf in New Orleans. Appellant has received the

compensation due him under the Longshoreman's and Harbor Workers' Compensation Act, but further contends that he is entitled to recovery because the vessel was unseaworthy. The District Court granted summary judgment for the defendant.

Careful consideration of the record, including the deposition of the plaintff, reveals no indication of unseaworthiness and that there was no genuine issue of fact thereasto. We must affirm. Admiralty Rule 58, Neal v. Lykes Bros. Steamship Co., 5 Cir., 1962, 306 F 2d 313; McQuiston v. Freighters and Tankers Steamship Company, 5 Cir., 1964, 327 F. 2d 746.

AFFIRMED.

Adm. Office, U.S. Courts - E.S. Upton Printing Co., N.O., La.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

WILL FOSTER — DIVISION "B"

versus — NO. 6214

LYKES BROTHERS STEAMSHIP COMPANY, INC., AND SS ZOELLA LYKES — ADMIRALTY

DECREE.

The Court having on September 1, 1965 granted the motion of respondent, Lykes Brothers Steamship Company, Inc., as Owner and claimant of the SS ZOELLA LYKES, for summary judgment:

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of respondent, Lykes Brothers Steamship Company, Inc., as owner and claimant of the SS ZOELLA LYKES, and against libelant, Will Foster, dismissing said libelant's libel with costs.

Dated at New Orleans, Louisiana, on this 12 day of November, 1965.

(signed) FRANK B. ELLIS
UNITED STATES DISTRICT JUDGE

Charles R. Maloney, Esq.
James L. Schupp, Jr., Esq.